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Supreme Court, U.S.
FILED
APR 28 1999
CLERK

No. 98-1338

In the Supreme Court of the United States

OCTOBER TERM, 1998

TEXAS ASSOCIATION OF DAIRYMEN, DAIRY PRODUCERS OF NEW MEXICO, LONE STAR MILK PRODUCERS, L.C. AND PREMIER MILK PRODUCERS, INC.,
Petitioners,

v.

MINNESOTA MILK PRODUCERS ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a motion to intervene for purposes of appeal is timely if filed in time to perfect such an appeal?

2. Whether a dairy farmer has standing to challenge provisions of a federal milk marketing order when the producer has no interest in the producer settlement fund of that particular federal milk marketing order?

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REPLY ARGUMENT

I.

Standing to challenge federal milk marketing orders is not without immediate consequences to the petitioners. The issuance of new regulations identified by the federal respondent promises litigation. Allowing milk producers who have no interest in the producer settlement fund of a particular regional order to challenge that order will, by design or fortuity, further the positions of consumers and processors in the court challenge. This Court has determined that neither of the latter have that

right. *Block v. Community Nutrition Institute*, 467 U.S. 340, 346-47 (1984). *United States v. Ruzicka*, 329 U.S. 287 (1946). So long as there remains a clear split in the circuits on the standing question, the petitioners, dairy producers with interests in producer settlement funds in various orders in the South and Southwest, face the continued risk that those not so situated will seek, and obtain, even temporarily, judicial intervention resulting in market instability. Subsequent appellate review, even if it ends in this Court, will not cure the instability resulting from even momentary interruption in response to claims by those without standing.

This Court has stated that an essential aspect of the Congressional scheme of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, was to protect the producer settlement funds from undue litigation.

> To make the vitality of the whole arrangement depend on the contingencies and inevitable delays of litigation, no matter how alertly pursued, is not a result to be attributed to Congress unless support for it is much more manifest than we here find. That Congress avoided such hazards for its policy is persuasively indicated by the procedure it devised for the careful administrative and judicial consideration of a handler's grievance. It thereby safeguarded individual as well as collective interests.

Ruzicka, supra, at 289.

The brief of the federal respondent concurs that the issue of standing to challenge a federal milk order is an important one but disagrees that this case is the appropriate one. Fed. Resp. Brief at 10. ("We do not dispute that the issue, in an appropriate case, could be a significant one.")

The federal respondent further agrees with petitioners that neither this Court nor any other circuit, besides the Eighth Circuit, has found that producers have a cause of action to contest marketing orders outside their own marketing areas. Fed. Resp. Brief at 10. Fn. 3.

The federal respondent, however, disagrees as to the limitation of such right. It goes on to argue that "Dairy farmers have no express right of action under the Agricultural Marketing Agreement Act". *Id.* at 10. This is consistent with *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985). This contrasts with the petitioners whose position is stated in the Sixth Circuit. *Farmers Union Milk Mktg. Coop. v. Yuetter*, 930 F. 2d 466 (6th Cir. 1991). Thus the need for clarity.

On the other hand, the Minnesota Dairy Farmer Respondents, who at least at the district court were successful in overturning marketing orders in regions in which they had no interest, will want to preserve that option for future and similar challenges. The Sixth Circuit in *Farmers Union Milk Mktg. Coop. v. Yuetter*, 930 F. 2d 466 (6th Cir. 1991) had before it producers with interests in the producer settlement fund and thus did not have to distinguish between the interests as in the instant case. The Eighth Circuit's misuse of the term "milk producers" in *Farmers* to encompass producers, such as MMPA, who have no interest in the settlement fund, does contradict this Court's decisions and other circuits. Further, its efforts to define the "definite personal right" identified by this Court in *Stark v. Wickard*, 321 U.S. 288 (1944) broadly enough to include them, but narrower than the distinction in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985) exemplifies the opportunity for standing to be granted mistakenly. MMPA Resp. Brief at 14-15.

So long as those with no interest in producer settlement funds, processors, consumers, or other dairy farmers, can initiate litigation that will destabilize the federal orders, there is an immediate need for this Court's clarification of the issue.

Thirdly, changes in the federal marketing orders will not change the issue of standing. See, Fed. Resp. Brief at 11. The concept of producer settlement funds and producer rights to those funds, core aspects in *Ruzicka, Community Nutrition*, and *Stark* remain unchanged. This is an insufficient basis upon which to delay addressing this important issue.

II.

That some of the circuits have evaluated post judgment intervention in terms of both being in time to perfect an appeal as well as other criteria is itself a reason that there needs to be clarification. There is no justification for using an analysis of prejudgment intervention in the post judgment context. After all, the thirty day window after judgment to perfect an appeal is the first opportunity to be part of the next stage, the appeal, it is not the last opportunity.

The criteria for pre judgment intervention contemplate ongoing litigation, discovery, motion practice, and trial deadlines. Intervention if not timely has the potential of delaying resolution and, in some circumstances, creating unfairness. "How far the litigation had progressed at the time of the motion" is thus a proper analysis of the stage of the proceeding. After judgment, all of the discovery, motion, and trial issues are resolved. How long from the commencement of the case until judgment is no longer a relevant discussion of stage of the proceedings. None of these issues are present post judgment when intervention is for appellate purposes. The appellate

calendar begins afresh upon filing of the notice of appeal, and the circuit courts establish the dates of filing briefs and appendices—none of which are impaired by intervention. Further, in as much as any intervenor after final judgment must take the trial court record as it finds it, the addition of a new party does not result in any prejudice or disruption of the parties' submissions.

Finally, other factors of intervention under the rule will aid the courts in addressing non timeliness issues.

III.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and Order of the United States Court of Appeals for the Eighth Circuit on both questions raised in the Petition.

Dated: April 28, 1999

Respectfully submitted,

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